

Standing and Secret Surveillance

STEPHEN I. VLADECK^{*†}

On February 26, 2013, a 5-4 majority of the U.S. Supreme Court held in *Clapper v. Amnesty International USA*¹ that a coalition of attorneys and human rights, labor, legal, and media organizations lacked Article III standing to pursue their constitutional challenge to section 702 of the Foreign Intelligence Surveillance Act (FISA).² Section 702—the central innovation of the FISA Amendments Act of 2008 (FAA)—provided new statutory authorization for mass electronic surveillance targeting communications of non-U.S. persons reasonably believed to be outside the United States. And although Congress expressly barred the use of section 702 to intentionally target communications by U.S. persons,³ the plaintiffs in *Clapper* alleged that the surveillance authorized by section 702 made it far more likely that such communications would nevertheless be intercepted. Given that section 702 requires no showing of

^{*} Professor of Law and Associate Dean for Scholarship, American University Washington College of Law. Thanks to Peter Shane for inviting me to participate in this symposium (and for helpful feedback on an earlier draft), and to Caitlin Marchand, American University Washington College of Law Class of 2015, and Mary Van Houten, Stanford Law School Class of 2014, for research assistance. In the interest of full disclosure, readers should know that I co-authored an amicus brief on behalf of the Petitioner in *In re EPIC*, 134 S. Ct. 638 (2013) (mem.). Needless to say, the views expressed herein are mine alone.

¹ 133 S. Ct. 1138 (2013).

² Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified at 50 U.S.C. §§ 1801 *et seq.* (2008)). Section 702 was added to FISA by the FISA Amendments Act of 2008 (FAA), Pub. L. No. 110-261, § 101, 122 Stat. 2436, 2438–48 (codified at 50 U.S.C. § 1881a (2008)).

³ See 50 U.S.C. § 1881a(b).

individualized suspicion before such communications are obtained,⁴ the plaintiffs argued that it would therefore be unconstitutional.⁵

In rejecting the plaintiffs' standing to pursue such claims, Justice Alito's opinion for the *Clapper* Court seized upon the secret nature of the alleged governmental surveillance that the plaintiffs sought to challenge.⁶ Because such secrecy prevented the plaintiffs from showing that the government's interception of their communications was "certainly impending," they could not establish the injury-in-fact required by the Court's prior interpretations of Article III's case-or-controversy requirement.⁷ At the time, the upshot of Justice Alito's analysis seemed obvious: given that the actual implementation of such surveillance authority is highly classified, it would be virtually impossible for any individual to *ever* satisfy the "certainly impending" standard that his majority opinion articulates. *Clapper* thereby appeared to insulate the government's secret surveillance programs—under section 702 or otherwise—from all external judicial challenge.⁸

In retrospect, the timing of the Supreme Court's decision in *Clapper* was more than a little ironic. Less than three months later, the *Washington Post* published details on the hitherto-secret "PRISM" program, pursuant to which the government, acting under section 702, has been "tapping directly into the central servers of nine leading U.S. Internet companies, extracting audio and video chats, photographs, e-mails, documents, and connection logs."⁹ And another Snowden-based story from late October revealed that "[t]he National

⁴ See *id.* §§ 1881a(a), (g).

⁵ See *Amnesty Int'l USA v. Clapper*, 638 F.3d 118, 121 (2d Cir. 2011), *rev'd*, 133 S. Ct. 1138.

⁶ *Clapper*, 133 S. Ct. at 1148 ("[R]espondents have no actual knowledge of the Government's § 1881a targeting practices. Instead, respondents merely speculate and make assumptions about whether their communications with their foreign contacts will be acquired under § 1881a.").

⁷ *Id.* at 1148–49 & n.4.

⁸ The statute *does* allow "electronic communication service providers" that receive section 702 directives from the government to object via *in camera* proceedings before the FISA Court—and to appeal adverse decisions to the FISA Court of Review and Supreme Court, where necessary. See 50 U.S.C. §§ 1881a(h)(4), (6). To date, however, *no* recipient of section 702 directives appears to have availed itself of such an opportunity. See Letter from Hon. Reggie B. Walton, Presiding Judge, FISC, to Hon. Patrick J. Leahy, Chairman, Sen. Comm. on the Judiciary, at 8–9 (July 29, 2013), *available at* <http://www.leahy.senate.gov/download/honorable-patrick-j-leahy>.

⁹ Barton Gellman & Laura Poitras, U.S., British Intelligence Mining Data from Nine U.S. Internet Companies in Broad Secret Program, *WASH. POST*, June 6, 2013, at A1.

Security Agency has secretly broken into the main communications links that connect Yahoo and Google data centers around the world.”¹⁰

One can certainly question whether *Clapper* would have come out the same way if these stories had broken prior to the Court’s decision.¹¹ And yet, although these disclosures seem to give even greater credence to the plaintiffs’ allegations in *Clapper*, they don’t necessarily cure the standing defect identified by Justice Alito. After all, plaintiffs still can’t identify *specific* communications of theirs that have been obtained by the government under PRISM. Moreover, even in the analogous context of the telephony metadata program under section 215 of the USA PATRIOT Act,¹² where the FISA Court orders disclosed by Edward Snowden included one identifying a specific phone company (Verizon) that has been turning over all of its business customers’ metadata,¹³ the government has continued to argue that parties don’t have standing to challenge such collection unless they can demonstrate not just that the government is *obtaining* their data, but that it is *using* it, as well.¹⁴ As of this writing, at least, those arguments have proven unavailing.¹⁵

¹⁰ Barton Gellman & Ashkan Soltani, *NSA Infiltrates Links to Yahoo, Google Data Centers Worldwide, Snowden Documents Say*, WASH. POST, Oct. 30, 2013, at A1; see also Barton Gellman et al., *How We Know the NSA Had Access to Internal Google and Yahoo Cloud Data*, WASH. POST: THE SWITCH (Nov. 4, 2013), <http://www.washingtonpost.com/blogs/the-switch/wp/2013/11/04/how-we-know-the-nsa-had-access-to-internal-google-and-yahoo-cloud-data>.

¹¹ See, e.g., Steve Vladeck, *The Verizon/Section 215 Order and the Clapper Mindset*, LAWFARE (June 5, 2013, 11:00 p.m.), <http://www.lawfareblog.com/2013/06/the-verizonsection-215-order-and-the-clapper-mindset>; see also Stephen I. Vladeck, *Big Data Before and After Snowden*, 7 J. NAT’L SEC. L. & POL’Y 333 (2014).

¹² Uniting and Strengthening America By Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 215, 115 Stat. 272, 287 (2001) (codified as amended at 50 U.S.C. § 1861 (2006)).

¹³ See *In re Application of the FBI for an Order Requiring the Production of Tangible Things from Verizon Bus. Network Servs., Inc.*, No. 13-80 (FISA Ct. Apr. 25, 2013), available at <http://www.theguardian.com/world/interactive/2013/jun/06/verizon-telephone-data-court-order>.

¹⁴ See, e.g., Defendants’ Memorandum of Law in Support of Motion to Dismiss the Complaint at 11–14, *ACLU v. Clapper*, 959 F. Supp. 2d 724 (S.D.N.Y. 2013) [hereinafter *ACLU Motion to Dismiss*].

¹⁵ Thus, although two district courts have divided on whether the metadata program is consistent with the Fourth Amendment, both *upheld* the standing of different Verizon customers to bring such a claim. See *ACLU*, 959 F. Supp. 2d at 735–38; *Klayman v. Obama*, 957 F. Supp. 2d 1, 26–29 (D.D.C. 2013).

But whatever the ultimate merits of the government's view,¹⁶ it remains unlikely as a general matter that the Snowden disclosures, by themselves, will have more than a frictional effect upon the ability of most whose communications are intercepted under secret government surveillance programs to challenge such surveillance in court. Instead, the far more interesting question is how the relationship between standing and secret surveillance fits into the more structural reforms Congress is currently considering with regard to improving accountability mechanisms in these contexts. Put another way, does Justice Alito's logic compel the conclusion that Article III prevents Congress from "fixing" *Clapper*, as it were (by relaxing the restrictive standing rule that Justice Alito's majority opinion articulates), or from otherwise providing for more vigorous judicial review of secret surveillance programs?

On the surface, the answer to this question appears to be "yes." Under the Supreme Court's 1992 decision in *Lujan v. Defenders of Wildlife*,¹⁷ Congress lacks the power to confer standing upon plaintiffs beyond that which Article III permits.¹⁸ As Justice Scalia wrote for the *Lujan* majority, "Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch."¹⁹

Upon closer consideration, however, *Lujan* is not as clear-cut as it is often portrayed. After all, Justices Kennedy and Souter—whose votes were necessary to the result—saw the issue more narrowly. "In my view," Kennedy wrote for the pair, "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."²⁰ The key is that "Congress must at the very least identify the injury it seeks to

¹⁶ Given subsequent stories that the government is collecting less than 20% of domestic telephony metadata, see Siobhan Gorman, *NSA Collects 20% or Less of U.S. Call Data*, WALL ST. J., Feb. 8, 2014, at A1, the *Clapper* argument may well resurface on appeal. After all, there is nothing in the Snowden disclosures that would allow a specific plaintiff to demonstrate that *their* phone records, specifically, were disclosed. Only if it must follow, as Judge Leon concluded in *Klayman*, that the government has collected *all* such records would there be no standing problem.

¹⁷ 504 U.S. 555 (1992).

¹⁸ *Id.* at 578.

¹⁹ *Id.* at 576.

²⁰ *Id.* at 580 (Kennedy, J., concurring in part and concurring in the judgment).

vindicate and relate the injury to the class of persons entitled to bring suit.”²¹

In this symposium essay, I aim to explore the potential implications of Justice Kennedy’s broader understanding of Congress’s power to confer standing for judicial review of secret surveillance programs going forward. After introducing the *Lujan* and *Clapper* decisions in Part I, Part II then addresses one possible implication—that Congress could respond to *Clapper* by expressly lowering the threshold that plaintiffs must surmount in private lawsuits challenging secret surveillance. As Part II concludes, it probably would not offend the reasoning of Justice Kennedy’s *Lujan* concurrence for Congress to authorize challenges to secret surveillance programs so long as plaintiffs could show that there was a “reasonable likelihood” that their communications would be intercepted by the government.

Of course, such a conclusion is without regard to the *merits* of such challenges, but it would suggest that suits like *Clapper* could indeed go forward—allowing courts to reach the difficult statutory and constitutional questions that their merits present. As Part II concludes, though, even if the constitutional validity of such a solution seems clear, there are reasons to doubt its long-term utility and efficacy.

With that in mind, Part III considers an alternative possibility—that, instead of empowering individuals like the *Clapper* plaintiffs to bring civil suits challenging secret government surveillance programs (which may very well defeat the purpose of *secret* surveillance), Congress might provide for greater (secret) adversarial process before the FISA Court itself. As Part III explains, such reforms would raise no new Article III concerns in the FISA Court, but would trigger difficult questions about standing to *appeal*—especially after and in light of the Supreme Court’s decision in the Proposition 8 case.²² Thus, for policymakers interested in increasing judicial review of secret government surveillance programs, the most logical (if imperfect) course may well be to pursue some combination of *both* measures—allowing parties to sue in those rare cases when sufficient evidence of their putative injuries has become public; and providing for more adversarial process in cases in which it has not.

²¹ *Id.*

²² See *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

I. ARTICLE III STANDING, CONGRESS, AND *CLAPPER*

It is familiar sledding that, throughout the 1970s and 1980s, the Supreme Court read into the case-or-controversy requirement of Article III of the Constitution ever-stricter requirements for establishing standing, especially to vindicate claims not recognized at common law.²³ Whatever prompted this shift in the Court's jurisprudence,²⁴ it was settled doctrine by the end of the 1980s that plaintiffs must establish "injury in fact," "causation," and "redressability" in order to have Article III standing to sue.²⁵ The one big question that the Justices had yet to answer was how much latitude Congress possessed to *define* those elements, especially when creating federal statutory causes of action for injuries arising largely—if not entirely—under federal law.

A. Lujan: Justice Scalia vs. Justice Kennedy

The Court answered that question in 1992 in *Lujan v. Defenders of Wildlife*.²⁶ At issue was the citizen-suit provision of the Endangered Species Act of 1973, which provided that "any person may commence a civil suit on his own behalf . . . to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter."²⁷ In *Lujan*, a host of environmental groups invoked that provision to challenge a new federal regulation that rescinded the applicability of various ESA procedural requirements to new federal projects overseas.

Writing for a 6-3 majority,²⁸ Justice Scalia first rejected the argument that the plaintiffs had alleged an "injury in fact" sufficient to

²³ See, e.g., William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988); Cass R. Sunstein, *What's Standing After Lujan?: Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992).

²⁴ See, e.g., RICHARD H. FALLON JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 114 (6th ed. 2009) (summarizing competing "sources of strain" that may have helped to precipitate modern standing doctrine).

²⁵ See, e.g., *Allen v. Wright*, 468 U.S. 737 (1984).

²⁶ 504 U.S. 555 (1992).

²⁷ Pub. L. No. 93-205, § 11, 87 Stat. 897 (1973) (codified at 16 U.S.C. § 1540(g)(1)(A)(2006)).

²⁸ Although seven Justices joined in the judgment, Justice Stevens did so only on the merits; like the dissenters, he disagreed with the majority's conclusion that the plaintiffs

satisfy Article III. As he explained, the plaintiffs had failed to show that any of their members were specifically planning to *visit* the overseas facilities where the new regulation would have had the allegedly deleterious effect, and so could not demonstrate that they were likely to incur a concrete, individualized injury as a result of the challenged administrative action. For a four-Justice plurality, Scalia also concluded that the plaintiffs had failed to satisfy Article III's redressability requirement: "Instead of attacking the separate decisions to fund particular projects allegedly causing them harm, respondents chose to challenge a more generalized level of Government action (rules regarding consultation), the invalidation of which would affect all overseas projects."²⁹

But the heart of Justice Scalia's opinion was Part IV, in which he explained (at least formally for the majority) that the citizen-suit provision of the ESA could not constitutionally cure either of these defects. As he wrote,

[T]here is absolutely no basis for making the Article III inquiry turn on the source of the asserted right. Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those "Cases" and "Controversies" that are the business of the courts rather than of the political branches.³⁰

Lujan thereby held that Congress had violated Article III in the ESA by purporting to confer standing upon those who could not satisfy the Court's three-pronged interpretation of the Constitution's case-or-controversy requirement. To be sure, Justice Scalia concluded, "[Statutory] broadening [of] the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury."³¹ But even in the former set of cases,

lacked standing to proceed. *See Lujan*, 504 U.S. at 581–82 (Stevens, J., concurring in the judgment); *id.* at 589–606 (Blackmun, J., dissenting).

²⁹ *Id.* at 568 (plurality opinion).

³⁰ *Id.* at 576 (majority opinion).

³¹ *Id.* at 578 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972)) (alterations in original).

Justice Scalia's opinion for the *Lujan* Court appeared to portend fairly sharp limits on Congress's power to so provide.³²

And yet, whereas Part IV of Justice Scalia's opinion in *Lujan* was nominally for a six-Justice majority, Justice Kennedy's concurring opinion—in which Justice Souter joined in full—offered a somewhat narrower understanding of the constitutional limits that the case-or-controversy requirement imposes on Congress.³³ Justice Kennedy agreed that it would violate Article III “if, at the behest of Congress and in the absence of any showing of concrete injury, we were to entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws.”³⁴ At the same time, he was equally clear that, “As Government programs and policies become more complex and far-reaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition.”³⁵ Unlike the general skepticism of broad statutory standing provisions evinced by Justice Scalia, the key for Justice Kennedy was that “the party bringing suit must show that the action injures him in a concrete and personal way.”³⁶ Thus, the upshot of Justice Kennedy's concurring opinion was that Congress *did* have fairly wide discretion to create an injury sufficiently concrete to satisfy Article III where one previously had not existed; it had just exceeded its limits in the ESA.

B. *After Lujan*

Although the distinction between Justice Scalia's majority opinion and Justice Kennedy's concurrence may at first have appeared semantic, the Court's subsequent jurisprudence illuminated both that

³² In an influential speech, then-Judge Scalia had already previewed his view of the strict limits that the Constitution imposes on Congress's power to confer standing. See Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

³³ *Lujan*, 504 U.S. at 579–81 (Kennedy, J., concurring). With respect to Part IV of Justice Scalia's opinion, Kennedy flagged that he joined it “with the following observations.” *Id.* at 580; see also, *Amason v. Kangaroo Exp.*, No. 09-2117, 2013 WL 987935, at *3 n.5 (N.D. Ala. Mar. 11, 2013) (“Because a majority opinion in *Lujan* is made possible only by counting Justice Kennedy's concurrence, its consideration is important in interpreting the holding of *Lujan*.”).

³⁴ *Lujan*, 504 U.S. at 580–81.

³⁵ *Id.* at 580.

³⁶ *Id.* at 581.

(1) there truly is daylight between Justice Kennedy's and Justice Scalia's view of Congress's power to confer standing; and (2) *Lujan* was an outlier—one of the only cases in which Congress exceeded the wide latitude Justice Kennedy believes it possesses to confer standing upon plaintiffs who might not otherwise be entitled to sue to vindicate certain statutory and constitutional injuries.

For example, in *FEC v. Akins*,³⁷ Justice Breyer (writing for a 6-3 majority that included Justice Kennedy) found no Article III problem with the Federal Election Campaign Act of 1971 (FECA),³⁸ even though it authorized *any* person to challenge alleged violations of the statute in the Federal Election Commission, and then to bring suit if the FEC dismissed their complaint.³⁹ In *Akins*, the plaintiffs challenged the FEC's determination that the American-Israel Public Affairs Committee (AIPAC) was not a "political committee," and was therefore not required to comply with various disclosure regulations and public reporting requirements.⁴⁰ Notwithstanding a sharply worded dissent from Justice Scalia,⁴¹ the Court held that "the informational injury at issue here, directly related to voting, the most basic of political rights, is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts."⁴²

Two years later, the Court in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.* upheld the standing of environmental plaintiffs who brought suit under the citizen-suit provision of the Clean Water Act⁴³ claiming that a permitted business was violating the Act's mercury discharge limits.⁴⁴ Focusing on the distinction between "injury to the environment" and "injury to the

³⁷ 524 U.S. 11 (1998).

³⁸ Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431–457 (2012)).

³⁹ See 2 U.S.C. §§ 437g(a)(1), (a)(8)(A).

⁴⁰ See *id.* § 431(4)(a).

⁴¹ See, e.g., *Akins*, 514 U.S. at 29–30 (Scalia, J., dissenting) ("The provision of law at issue in this case is an extraordinary one, conferring upon a private person the ability to bring an Executive agency into court to compel its enforcement of the law against a third party.").

⁴² *Id.* at 24–25 (majority opinion).

⁴³ 33 U.S.C. § 1365(a) (2012).

⁴⁴ 528 U.S. 167 (2000).

plaintiff,”⁴⁵ Justice Ginsburg’s majority opinion highlighted the injuries alleged by various members of Friends of the Earth.⁴⁶ Because these injuries were concrete and specific, the Court held that they were sufficient to satisfy Article III standing.⁴⁷

In a short concurrence, Justice Kennedy flagged the “[d]ifficult and fundamental questions [that] are raised when we ask whether exactions of public fines by private litigants, and the delegation of Executive power which might be inferable from the authorization, are permissible in view of the responsibilities [constitutionally] committed to the Executive.”⁴⁸ But he nevertheless joined the majority, as opposed to Justice Scalia’s dissent, which concluded that “[t]he undesirable and unconstitutional consequence of today’s decision is to place the immense power of suing to enforce the public laws in private hands.”⁴⁹

Finally, in *Massachusetts v. EPA*,⁵⁰ a 5-4 majority (again including Justice Kennedy) held that a state had standing to sue the Environmental Protection Agency under the Clean Air Act to challenge its failure to regulate greenhouse gas emissions from motor vehicles.⁵¹ Although some elements of Justice Stevens’s analysis appeared to turn on the “special solicitude” owed to states as plaintiffs,⁵² Justice Stevens also emphasized the critical role of Congress—expressly invoking Justice Kennedy’s views: “The parties’ dispute turns on the proper construction of a congressional statute, a question eminently suitable to resolution in federal court. Congress has moreover authorized this type of challenge to EPA action. That

⁴⁵ *Id.* at 181.

⁴⁶ *See id.* at 181–83.

⁴⁷ *See id.* at 183–88.

⁴⁸ *Id.* at 197 (Kennedy, J., concurring).

⁴⁹ *Id.* at 215 (Scalia, J., dissenting).

⁵⁰ 549 U.S. 497 (2007).

⁵¹ *See* 42 U.S.C. § 7607(b)(1) (2012) (authorizing judicial review of “any . . . nationally applicable regulations promulgated, or final action taken, by the Administrator”).

⁵² *See* Stephen I. Vladeck, *States’ Rights and State Standing*, 46 U. RICH. L. REV. 845, 856–57 (2012) (situating *Massachusetts* within a broader array of decisions in which the Supreme Court has recognized state standing when states are suing to enforce *their* federal rights, as opposed to the rights of their citizens).

authorization is of critical importance to the standing inquiry.”⁵³ Notwithstanding a stern dissent from Chief Justice Roberts (joined by, among others, Justice Scalia), the Court thereby allowed Massachusetts’ challenge to go forward.⁵⁴

To be sure, as the Court’s most recent environmental standing case—*Summers v. Earth Island Institute*⁵⁵—attests, Justices Scalia and Kennedy are still often on the same side in Article III standing cases, even those raising Congress’s power to create standing where none previously existed. But even in *Summers*, Justice Kennedy wrote a separate concurrence to explain that he was joining Justice Scalia’s majority opinion only because he agreed that “deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing.”⁵⁶ As he elaborated, “This case would present different considerations if Congress had sought to provide redress for a concrete injury ‘giv[ing] rise to a case or controversy where none existed before.’ Nothing in the statute at issue here, however, indicates Congress intended to identify or confer some interest separate and apart from a procedural right.”⁵⁷

⁵³ *Massachusetts v. EPA*, 549 U.S. at 516 (citation omitted). The remainder of the paragraph (and most of the next page) quoted from Justice Kennedy’s *Lujan* concurrence. See *id.* at 516–17 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part and concurring in judgment)).

⁵⁴ *Id.* at 535–49 (Roberts, C.J., dissenting). Justice Scalia penned a separate dissent—albeit on the merits. See *id.* at 549–60 (Scalia, J., dissenting).

⁵⁵ 555 U.S. 488 (2009). Specifically, *Summers* held that environmental organizations lacked standing to sue the U.S. Forest Service in order to enjoin application of regulations to exempt certain timber from the notice, comment, and appeal process set forth in the Forest Service Decisionmaking and Appeals Reform Act. Although the Act authorized such claims, Justice Scalia’s majority opinion stressed that:

It makes no difference that the procedural right has been accorded by Congress. That can loosen the strictures of the redressability prong of our standing inquiry—so that standing existed with regard to the Burnt Ridge Project, for example, despite the possibility that Earth Island’s allegedly guaranteed right to comment would not be successful in persuading the Forest Service to avoid impairment of Earth Island’s concrete interests. Unlike redressability, however, the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute.

Id. at 497 (citations omitted).

⁵⁶ *Id.* at 501 (Kennedy, J., concurring) (internal quotation marks omitted).

⁵⁷ *Id.* (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment) (alteration in original)).

Akins, *Friends of the Earth, Massachusetts*, and *Summers* all dealt with Congress's power to define "injuries" on terms more capacious than those that courts would otherwise have identified, as opposed to Congress's power to define the burden of proof plaintiffs must satisfy in order to *establish* an injury in fact. But Justice Kennedy's *Lujan* concurrence stressed Congress's power to *both* "define injuries *and* articulate chains of causation that will give rise to a case or controversy where none existed before." It should follow that Congress's power to articulate chains of causation includes Congress's power to legislate the means pursuant to which plaintiffs may demonstrate that such chains exist. There has not yet been a post-*Lujan* case testing this proposition, however—perhaps because Congress has not been impelled to so provide in any post-*Lujan* statute.

C. *Clapper*

Unlike the cases surveyed above, the lawsuit that gave rise to the Supreme Court's *Clapper* decision was not seeking to take advantage of a citizen-suit provision in a federal statute. Instead, *Clapper* involved a fairly conventional constitutional challenge to an unconventional statute—the FISA Amendments Act of 2008.⁵⁸ The origins and history of the FAA have been well-described elsewhere;⁵⁹ for present purposes, it suffices to highlight the FAA's centerpiece, new section 702 of FISA. As Justice Alito summarized in *Clapper*, that provision

supplements pre-existing FISA authority by creating a new framework under which the Government may seek the FISC's authorization of certain foreign intelligence surveillance targeting the communications of non-U.S. persons located abroad. Unlike traditional FISA surveillance, § 1881a does not require the Government to demonstrate probable cause that the target of the electronic surveillance is a foreign power or agent of a foreign power. And, unlike traditional FISA, § 1881a

⁵⁸ Foreign Intelligence Surveillance Act Amendments Act of 2008, Pub. L. No. 110-261, § 101, 122 Stat. 2436, 2438–48 (codified at 50 U.S.C. §§ 1881–1881g (2008)).

⁵⁹ See, e.g., 1 DAVID KRIS & J. DOUGLAS WILSON, NATIONAL SECURITY INVESTIGATIONS AND PROSECUTIONS §§ 9:11, 17:3 (2d ed. 2012); see also Stephanie Cooper Blum, *What Really is at Stake With the FISA Amendments Act of 2008 and Ideas for Future Surveillance Reform*, 18 B.U. PUB. INT. L.J. 269 (2009).

does not require the Government to specify the nature and location of each of the particular facilities or places at which the electronic surveillance will occur.⁶⁰

Section 702 makes clear that the authorized surveillance cannot be undertaken with the *intent* or *purpose* of targeting U.S. persons.⁶¹ But insofar as section 702 contemplates the sweeping and undifferentiated interception of a high volume of electronic communications, it is certainly at least possible—if not likely—that communications of U.S. persons will be intercepted notwithstanding such statutory constraints.

With that in mind, a group of plaintiffs who routinely communicate with non-citizens outside the United States brought suit on the day the FISA Amendments Act was signed into law, challenging section 702 on a host of constitutional grounds. Foremost among these was the claim that the statute violated the Fourth Amendment insofar as it authorized the *knowing* interception of U.S. persons' communications without a warrant and/or probable cause.⁶² And because fear of such interception had led the plaintiffs to take concrete steps to communicate through alternative channels, they claimed that section 702 thereby caused an “injury-in-fact” sufficient to confer Article III standing.⁶³

In August 2009, the U.S. District Court for the Southern District of New York disagreed.⁶⁴ Relying on an earlier Sixth Circuit decision

⁶⁰ *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1144 (2013) (citations omitted).

⁶¹ See 50 U.S.C. § 1881a(b).

⁶² To be clear, the Fourth Amendment argument is hardly open-and-shut. The FISA Court of Review, for example, has recognized a “foreign intelligence surveillance” exception to the Fourth Amendment’s Warrant Clause, see *In re Directives [Redacted] Pursuant to Section 105B of the Foreign Intelligence Surveillance Act*, 551 F.3d 1004 (FISA Ct. Rev. 2008), which, if valid, would arguably encompass *all* surveillance conducted under section 702. Even if such an exception does not encompass interception of U.S. persons’ communications, courts have held in other contexts that the “incidental” interception of protected communications as part of otherwise valid surveillance does not violate the Fourth Amendment. *But see* *United States v. Bin Laden*, 126 F. Supp. 2d 264, 280–82 (S.D.N.Y. 2000) (questioning the applicability of this rule in cases in which the “incidental” interception is not unanticipated). The relevant point for present purposes is simply that the claim in *Clapper* raised a serious constitutional question—regardless of its answer.

⁶³ See Complaint for Declaratory and Injunctive Relief, *Amnesty Int'l USA v. McConnell*, 646 F. Supp. 2d 633 (S.D.N.Y. 2009) (No. 08-civ-6259), available at https://www.aclu.org/files/pdfs/natsec/amnesty/07_10_2008_Complaint.pdf.

⁶⁴ *McConnell*, 646 F. Supp. 2d 633.

concluding that similar plaintiffs lacked standing to challenge the warrantless “Terrorist Surveillance Program,”⁶⁵ Judge Koeltl held that Article III standing was absent because section 702 did not (1) directly regulate or proscribe the plaintiffs’ conduct; or (2) authorize surveillance of a class of persons that included the plaintiffs.⁶⁶

Eighteen months later, the Second Circuit reversed.⁶⁷ As Judge Lynch wrote for a unanimous three-judge panel:

[T]he plaintiffs here have alleged that they reasonably anticipate direct injury from the enactment of the FAA because, unlike most Americans, they engage in legitimate professional activities that make it reasonably likely that their privacy will be invaded and their conversations overheard—unconstitutionally, or so they argue—as a result of the surveillance newly authorized by the FAA, and that they have already suffered tangible, indirect injury due to the reasonable steps they have undertaken to avoid such overhearing, which would impair their ability to carry out those activities.⁶⁸

The government subsequently sought rehearing en banc, only to have the Second Circuit divide 6-6—and thereby leave the panel decision intact.⁶⁹ Granting the government’s ensuing petition for certiorari,⁷⁰ the Supreme Court reversed the Second Circuit, holding that the plaintiffs had failed to carry the Article III standing burden.⁷¹

⁶⁵ See *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007).

⁶⁶ *McConnell*, 646 F. Supp. 2d at 645–58.

⁶⁷ *Amnesty Int’l USA v. Clapper*, 638 F.3d 118 (2d Cir. 2011).

⁶⁸ *Id.* at 149.

⁶⁹ *Amnesty Int’l USA v. Clapper*, 667 F.3d 163 (2d Cir. 2011) (mem.). The six dissenting judges penned four separate opinions explicating their reasons for dissenting from the denial of rehearing en banc. See *id.* at 172 (Raggi, J., dissenting from denial of rehearing en banc); *id.* at 193 (Livingston, J., dissenting from denial of rehearing en banc); *id.* at 200 (Jacobs, C.J., dissenting from denial of rehearing en banc); *id.* at 204 (Hall, J., dissenting from denial of rehearing en banc). The dissents prompted a concurrence from Judge Lynch—the author of the panel opinion and the only member of the panel entitled to participate in the en banc proceedings. See *id.* at 164 (Lynch, J., concurring in the denial of rehearing en banc).

⁷⁰ *Clapper v. Amnesty Int’l USA*, 132 S. Ct. 2431 (2012) (mem.).

⁷¹ *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138 (2013).

As noted above, at the heart of Justice Alito's opinion for a 5-4 majority in *Clapper* was the plaintiffs' inability to show that their communications were being (or would be) intercepted pursuant to surveillance undertaken under section 702. As he explained:

Respondents assert that they can establish injury in fact that is fairly traceable to § 1881a because there is an objectively reasonable likelihood that their communications with their foreign contacts will be intercepted under § 1881a at some point in the future. This argument fails. As an initial matter, the Second Circuit's "objectively reasonable likelihood" standard is inconsistent with our requirement that "threatened injury must be certainly impending to constitute injury in fact." Furthermore, respondents' argument rests on their highly speculative fear that: (1) the Government will decide to target the communications of non-U.S. persons with whom they communicate; (2) in doing so, the Government will choose to invoke its authority under § 1881a rather than utilizing another method of surveillance; (3) the Article III judges who serve on the Foreign Intelligence Surveillance Court will conclude that the Government's proposed surveillance procedures satisfy § 1881a's many safeguards and are consistent with the Fourth Amendment; (4) the Government will succeed in intercepting the communications of respondents' contacts; and (5) respondents will be parties to the particular communications that the Government intercepts. As discussed below, respondents' theory of standing, which relies on a highly attenuated chain of possibilities, does not satisfy the requirement that threatened injury must be certainly impending.⁷²

Of course, the only reason why the plaintiffs' allegations in this regard were so "highly speculative" was because the government's surveillance operations under section 702 were (and largely remain) secret. As Justice Breyer pointed out in his dissent, the surveillance alleged by the plaintiffs "is as likely to take place as are most future events that commonsense inference and ordinary knowledge of

⁷²*Id.* at 1147–48 (citations omitted).

human nature tell us will happen.”⁷³ In any event, the real flaw with the majority opinion, Breyer argued, was its adoption of the “certainly impending” standard. In his words, “*certainly* is not, and never has been, the touchstone of standing. The future is inherently uncertain.” Instead, “what the Constitution requires is something more akin to ‘reasonable probability’ or ‘high probability.’ The use of some such standard is all that is necessary here to ensure the actual concrete injury that the Constitution demands.”⁷⁴

D. After *Clapper* (and Snowden)

The Supreme Court’s decision in *Clapper* may well have sounded the death knell for suits challenging secret surveillance (if not all secret governmental programs), but for the disclosures by former NSA employee Edward Snowden that began in June 2013. One of Snowden’s most significant leaks was the existence and scope of the so-called “PRISM” program, ostensibly undertaken pursuant to section 702. Quoting Oregon Senator Mark Udall, the front-page *Washington Post* article disclosing the program noted that “there is nothing to prohibit the intelligence community from searching through a pile of communications, which may have been incidentally or accidentally been collected without a warrant, to deliberately search for the phone calls or e-mails of specific Americans.”⁷⁵

Together with later disclosures,⁷⁶ the PRISM story appears to indicate that the surveillance of which the plaintiffs complained in *Clapper* was “certainly impending”; indeed, it was already afoot. In light of *Clapper*, the question then turned to how such surveillance might be subjected to greater judicial review.

⁷³ *Id.* at 1155 (Breyer, J., dissenting); see also *id.* at 1160 (“[W]e need only assume that the Government is doing its job (to find out about, and combat, terrorism) in order to conclude that there is a high probability that the Government will intercept at least some electronic communication to which at least some of the plaintiffs are parties. The majority is wrong when it describes the harm threatened plaintiffs as ‘speculative.’”).

⁷⁴ *Id.* at 1165; see also *id.* at 1160 (“[F]ederal courts frequently entertain actions for injunctions and for declaratory relief aimed at preventing future activities that are reasonably likely or highly likely, but not absolutely certain, to take place. And that degree of certainty is all that is needed to support standing here.”).

⁷⁵ Gellman & Poitras, *supra* note 9; see *Clapper* at 1160 (“Even when the system works just as advertised, with no American singled out for targeting, the NSA routinely collects a great deal of American content. That is described as ‘incidental,’ and it is inherent in contact chaining, one of the basic tools of the trade.”).

⁷⁶ See *supra* note 10 and accompanying text.

II. THE *CLAPPER* “FIX”? : LOWERING THE STANDING BAR BY STATUTE

A. *FISA After Clapper*

Notwithstanding Snowden’s disclosures, the government has continued to argue in analogous contexts that the Supreme Court’s *Clapper* decision militates against standing to challenge the government’s secret surveillance programs. Thus, in the ACLU’s challenge to the bulk metadata collection program under section 215 of the USA PATRIOT Act, the government has continued to contest standing despite the disclosure of orders by the FISA Court compelling telephone companies like Verizon to turn over their business customers’ telephony metadata in bulk. Specifically, the government’s argument is that the alleged constitutional violation—and, therefore, the Article III injury—does not arise from the *collection* of the metadata, but only from its querying. And because plaintiffs can only demonstrate that their metadata are being collected (and not that they are being queried), they cannot overcome *Clapper*.⁷⁷

Whatever one thinks of such a distinction as a logical matter, the larger legal point that it underscores is the exceptionally high bar *Clapper* imposes before plaintiffs will be able to challenge secret government surveillance programs going forward. Indeed, even if courts subsequently conclude, contra the government, that the injury occurs at the point of collection, that still assumes that future plaintiffs will be able to *prove* that such collection is occurring—a difficult proposition at best in the absence of additional Snowden-like disclosures or far greater volitional transparency on the part of the government.

At the same time, one of the more underappreciated features of FISA is the cause of action it already provides for an “aggrieved person” “other than a foreign power or an agent of a foreign power [as defined by FISA], who has been subjected to an electronic surveillance.”⁷⁸ FISA proceeds to define “electronic surveillance” somewhat convolutedly,⁷⁹ but it nevertheless manifests Congress’s

⁷⁷ See *ACLU Motion to Dismiss*, *supra* note 14. But see *supra* note 15 (citing two district court decisions rejecting the government’s argument, and upholding the standing of different Verizon customers to challenge the telephony metadata program).

⁷⁸ 50 U.S.C. § 1810 (2012); see also *Fed. Elec. Comm’n v. Akins*, 524 U.S. 11, 19 (1998) (“History associates the word ‘aggrieved’ with a congressional intent to cast the standing net broadly—beyond the common-law interests and substantive statutory rights upon which ‘prudential’ standing traditionally rested.”).

⁷⁹ See 50 U.S.C. § 1801(f).

intent, from the inception of FISA, to allow those whose communications are unlawfully obtained *under* FISA to bring private suits to challenge such surveillance.⁸⁰ Simply put, Congress has already *created* a private cause of action for FISA suits; it has just never clarified how putative plaintiffs can demonstrate that they are, in fact, “aggrieved persons.”

B. *Defining the Injury*

With that in mind, suppose Congress enacted the following language as new subsection (b) to 50 U.S.C. § 1810:

For purposes of any claim brought in any court of the United States challenging surveillance conducted pursuant to this chapter, an “aggrieved person” is any person or entity (other than a foreign power or an agent of a foreign power) who can demonstrate (i) a reasonable basis to believe that their communications will be acquired under this chapter; and (ii) that they have taken objectively reasonable steps to avoid such surveillance.⁸¹

At first blush, such language should largely ameliorate the *Clapper* problem. After all, one can hardly conclude that the *Clapper* plaintiffs’ concerns were *unreasonable* given the language of the statute as it was enacted—and especially after and in light of the *Washington Post*’s Snowden-aided disclosure of the PRISM program. To similar effect, the *Clapper* plaintiffs had indeed undertaken objectively reasonable steps to avoid such surveillance—by pursuing alternative (and more expensive) means of communicating with non-citizens

⁸⁰ In *Al-Haramain Islamic Foundation, Inc. v. Obama*, 705 F.3d 845 (9th Cir. 2012), the Ninth Circuit held that Congress, in creating the cause of action provided by § 1810, was insufficiently clear that it intended to waive the federal government’s sovereign immunity, and so § 1810 did not authorize suits for damages against government officers in their official, as opposed to individual, capacity. Leaving aside the questionable logic of the court’s analysis, it should not disturb the availability of § 1810 for suits for declaratory or injunctive relief (and Congress could also overrule *Al-Haramain* if it were to enact the language proposed above).

⁸¹ For an earlier variation on this theme, see Steve Vladeck, *The Clapper Fix: Congress and Standing to Challenge Secret Surveillance*, LAWFARE (June 20, 2013, 12:48 p.m.), <http://www.lawfareblog.com/2013/06/the-clapper-fix-congress-and-standing-to-challenge-secret-surveillance/>.

outside the territorial United States.⁸² It should not even be a close question whether the *Clapper* plaintiffs could satisfy such a statutory standing provision.

The harder question is whether such a provision would be constitutional. In his *Clapper* dissent, Justice Breyer seemed to suggest that the answer would be yes: “[W]hat the Constitution requires is something more akin to ‘reasonable probability’ or ‘high probability.’ The use of some such standard is all that is necessary here to ensure the actual concrete injury that the Constitution demands.”⁸³ And, per the above discussion, Justice Kennedy’s *Lujan* concurrence and subsequent opinions appear to support Justice Breyer’s view inasmuch as they underscore his view of Congress’s power to “articulate chains of causation.” So long as Congress is not creating standing for what is (1) effectively a generalized grievance;⁸⁴ or (2) a procedural right without a substantive deprivation,⁸⁵ Justice Kennedy appears to share the view of the *Clapper* dissenters—and would therefore likely uphold such a potentially expansive standing provision.

C. *The Potential Shortcomings of a Clapper Fix*

Ultimately, the larger problems with such a *Clapper* “fix” are not legal, but practical: For starters, there is little reason to believe that disclosures of programs such as PRISM are going to become a recurring feature of American public discourse—or even that we now know about all of the potentially unlawful secret surveillance to which U.S. persons are currently being subjected. And to the extent that current or future programs are based upon statutes not remotely as clear in their potential scope as section 702, the absence of such

⁸² See, e.g., *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1145–46 (2013).

⁸³ *Id.* at 1168 (Breyer, J., dissenting).

⁸⁴ For potentially nationwide surveillance such as the bulk metadata and PRISM programs, it is certainly true that any constitutional “injury” is widely shared. Standing alone, though, that fact does not raise generalized grievance concerns: “Often the fact that an interest is abstract and the fact that it is widely shared go hand in hand. But their association is not invariable, and where a harm is concrete, though widely shared, the Court has found ‘injury in fact.’” *Fed. Elec. Comm’n v. Akins*, 524 U.S. 11, 24 (1998) (citing *Public Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 449–50 (1989)).

⁸⁵ Where the claim is unlawful interception of the *plaintiff’s* communications, this concern is not presented. It *does* arise, however, in the context of allowing other parties to challenge government surveillance programs at least nominally on the public’s behalf. See *infra* Part III.

disclosures would likely be fatal to the ability of plaintiffs to satisfy even the lower standing threshold proposed above. Simply put, such a *Clapper* fix may well be constitutional, but it may also not accomplish much outside the specific context of challenges to section 702.

The same logic would also presumably result if the government succeeds in its efforts to distinguish between the *collection* of information from U.S. persons and the *querying* of that information, an argument that has been publicly aired only in district court briefs thus far.⁸⁶ If the relevant injury for constitutional purposes does not arise from the government's obtaining of an individual's data and/or communications, but rather its specific accessing thereof, even the language outlined above may well prove inadequate to allow a putative plaintiff to establish that a current or future secret surveillance program is in fact injuring them.⁸⁷

Finally, there is the matter of the elephant in the room: it would logically defeat the purpose of secret surveillance programs if those programs could be challenged in visible, public litigation in which plaintiffs could presumably seek to discover information concerning the existence and scope—and sources and methods—of the government's surveillance. Whether or not the government would be entitled to avail itself of the state secrets privilege in such cases,⁸⁸ the

⁸⁶ See ACLU Motion to Dismiss, *supra* note 14.

⁸⁷ Although the district court in *Klayman v. Obama* rejected the government's effort to draw this distinction, it also held that the plaintiffs in that case had standing to challenge the NSA's querying procedures, as well. As Judge Leon explained, "The Government . . . describes the advantages of bulk collection in such a way as to convince me that plaintiffs' metadata—indeed everyone's metadata—is analyzed, manually or automatically, whenever the Government runs a query using as the 'seed' a phone number or identifier associated with a phone for which the NSA has not collected metadata (e.g., phones operating through foreign phone companies)." *Klayman v. Obama*, 957 F. Supp. 2d 1, 28 (D.D.C. 2013) (footnote omitted).

⁸⁸ At least one district court has held that the cause of action provided by FISA, *see* 50 U.S.C. § 1810, necessarily abrogates the state secrets privilege in cases brought under that provision. *See In re Nat'l Sec. Agency Telecomms. Records Litig.*, 700 F. Supp. 2d 1182 (N.D. Cal. 2010), *aff'd in part, rev'd in part on other grounds sub nom; Al-Haramain Islamic Found. v. Obama*, 705 F.3d 845 (9th Cir. 2012). The Fourth Circuit, in contrast, has held that the state secrets privilege is constitutionally grounded, *see El-Masri v. United States*, 479 F.3d 296, 303 (4th Cir. 2007) ("Although the state secrets privilege was developed at common law, it performs a function of constitutional significance, because it allows the executive branch to protect information whose secrecy is necessary to its military and foreign-affairs responsibilities."), which would militate against Congress's power to abrogate it. *Cf. Zivotofsky ex rel. Zivotofsky v. Sec'y of State*, 725 F.3d 197 (D.C. Cir. 2013) (striking down a statute on the ground that it interfered with the President's exclusive constitutional authority over foreign relations), *cert. granted*, No. 13-628, 2014 WL 1515718 (U.S. Apr. 21, 2014).

possibility of such disclosure-through-litigation provides still further reason to doubt that “fixing” *Clapper* is a workable, complete, and comprehensive solution—at least on its own.

III. AN ALTERNATIVE: SPECIAL ADVOCATES AND APPELLATE STANDING

A. FISA’s “Adversarial” Process

The inadequacies of external civil litigation may help to explain why so much attention has increasingly come to focus on the procedures before the FISA Court itself—especially the possibility of improving upon and expanding mechanisms for adversarial participation before the court as a means of increasing accountability for secret government surveillance programs.⁸⁹ This point may seem counterintuitive; as initially conceived, FISA was designed explicitly to *not* be adversarial, but to instead resemble the *ex parte* and *in camera* warrant process Congress codified in the context of wiretap applications in ordinary criminal cases.⁹⁰ Indeed, the lack of adversarial process led some—including future Court of Appeals (and FISA Court of Review) Judge Laurence Silberman—to argue that such proceedings might even violate Article III insofar as they effectively sought advisory opinions from the FISA Court.⁹¹

In ordinary criminal cases, federal courts have long upheld the non-adverse nature of warrant applications by indulging something of a fiction—that the warrants are ancillary to a judicial process that will *eventually* culminate in an opportunity for adversarial presentation of

⁸⁹ See, e.g., James G. Carr, *A Better Secret Court*, N.Y. TIMES, July 23, 2013, at A21; see also, Stephen I. Vladeck, *It’s Time To Fix the FISA Court (the Way Congress Intended)*, MSNBC (Aug. 1, 2013), <http://www.msnbc.com/msnbc/its-time-fix-the-fisa-court-the-way>.

⁹⁰ See, e.g., *United States v. Koyomejian*, 946 F.2d 1450, 1456 (9th Cir. 1991) (“[I]n drafting FISA Congress used Title III as its model, particularly for procedures relating to necessity and minimization.”); see also S. REP. NO. 95-604 (1978), *reprinted in* 1978 U.S.C.A.N. 3904.

⁹¹ See *Foreign Intelligence Electronic Surveillance: Hearings on H.R. 5794, 9745, 7308, and 5632 Before the Subcomm. on Legislation of the Permanent Select Comm. on Intelligence*, 95th Cong., 2d Sess. 221–23 (1978) (statement of Laurence H. Silberman). See generally ANDREW NOLAN ET AL., CONG. RES. SERV., INTRODUCING A PUBLIC ADVOCATE INTO THE FOREIGN INTELLIGENCE SURVEILLANCE ACT’S COURTS: SELECT LEGAL ISSUES 19 (2013) (summarizing the constitutional issues surrounding FISA), available at <http://justsecurity.org/wp-content/uploads/2013/10/CRS-Report-FISC-Public-Advocate-Oct.-25-2013.pdf>.

the issues, *e.g.*, in a motion to suppress the fruits of the warrant during a criminal trial, or a civil suit for damages challenging the legality of the search conducted pursuant to the warrant.⁹² Insofar as the FISA process was at least initially modeled on a similar understanding, then, the argument goes that FISA satisfies Article III to the same extent as the warrant process in ordinary criminal cases.⁹³

Even if that analogy works, though, it fails to account for the fundamental shift in the nature of the judicial review the FISA Court conducts under some of the government's newer FISA authorities. For example, neither the production orders the government may obtain under section 215 of the USA PATRIOT Act nor the directives that issue under section 702 are even plausibly characterized as "warrants" based upon individualized probable cause determinations. Both are more tantamount to administrative orders directed to third parties—based not upon any individual suspicion, but rather upon the utility of such bulk collection. Nor is it conceivable (let alone likely) that a statistically significant percentage of the information obtained under these authorities will ever be subject to collateral attack in a criminal or civil proceeding. Perhaps because the adverseness fiction breaks down in these contexts, the statutes creating these authorities also provide—for the first time—for the possibility of adverse litigation before the FISA Court.

To that end, section 215 authorizes "[a] person receiving a production order" under that provision to "challenge the legality of that order,"⁹⁴ and to seek review in the FISA Court of Review (and,

⁹² See, *e.g.*, David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 1106 n.663 (2008).

⁹³ See, *e.g.*, *United States v. Megahey*, 553 F. Supp. 1180, 1196 (E.D.N.Y. 1982); see also *United States v. Falvey*, 540 F. Supp. 1306, 1313 n.16 (E.D.N.Y. 1982). A different argument, and one offered by the FISA Court of Review in 2002, is that the judges of the FISA Court are not actually exercising judicial power *at all* when they are approving government applications, and so are not bound by Article III's case-or-controversy requirement. See, *e.g.*, *In re Sealed Case*, 310 F.3d 717, 732 n.19 (FISA Ct. Rev. 2002); see also NOLAN ET AL., *supra* note 88, at 16–17. Such an argument utterly fails to persuade. For starters, the FISA Court has itself *held* that it is an Article III court. See *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 486 (FISA Ct. 2007) ("Notwithstanding the esoteric nature of its caseload, the FISC is an inferior federal court established by Congress under Article III."); see also *United States v. Cavanagh*, 807 F.2d 787, 791–92 (9th Cir. 1987) (Kennedy, J.). Moreover, its decisions are subject to supervisory *appellate* review by the FISA Court of Review and then the U.S. Supreme Court. Insofar as the FISA process could be justified as existing outside of Article III, having "initial" Article III review in the U.S. Supreme Court would appear to contravene the limits on that Court's original jurisdiction as articulated in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

⁹⁴ 50 U.S.C. § 1861(f)(2)(A) (2012).

ultimately, in the Supreme Court), if they are unsuccessful.⁹⁵ And section 702 authorizes “[a]n electronic communication service provider receiving a directive” under section 702 to “file a petition to modify or set aside such directive with the Foreign Intelligence Surveillance Court,”⁹⁶ on the grounds that “the directive does not meet the requirements of this section, or is otherwise unlawful.”⁹⁷ As with section 215, section 702 further authorizes appeal to the FISA Court of Review, and then the Supreme Court, of adverse decisions.⁹⁸

Both sections also include a panoply of procedural rules in such cases—designed to ensure both the expediency and secrecy of such adversarial process.⁹⁹ Presumably, the animating principle behind both provisions is that such adversarial participation can simultaneously (1) ameliorate the Article III questions that FISA might otherwise raise; and (2) allow for at least some adversarial presentation and argument on the relevant legal principles.

One can certainly question *whether* the recipients of directives under section 702 or production orders under section 215 are in a position meaningfully to vindicate the rights of those whose communications are actually being acquired as a result.¹⁰⁰ But there is an even more basic problem: According to a July 2013 letter from Judge Walton to the Senate Judiciary Committee,¹⁰¹ *no* third-party had, to that point, ever availed itself of either of these adversarial processes—under section 215 *or* section 702.¹⁰² Thus, even if

⁹⁵ *Id.* § 1861(f)(3).

⁹⁶ *Id.* § 1881a(h)(4)(A) (2012).

⁹⁷ *See id.* § 1881a(h)(4)(C).

⁹⁸ *See id.* § 1881a(h)(6).

⁹⁹ *See id.* §§ 1861(f)(4), (5), 1881a(h)(4)(D)–(F).

¹⁰⁰ Indeed, the interests of a telephone or internet service provider will necessarily diverge from the interests of at least some of their customers, especially given that (1) the provider’s cooperation with the government is ostensibly secret; and (2) *non*-cooperation will potentially incur significant economic (and non-economic) costs arising out of the litigation, whereas cooperation is reimbursed. *See, e.g.*, 50 U.S.C. § 1881a(h)(2) (“The Government shall compensate, at the prevailing rate, an electronic communication service provider for providing information, facilities, or assistance in accordance with a directive issued pursuant to paragraph (1).”).

¹⁰¹ *See* Letter from Hon. Reggie B. Walton, Presiding Judge, FISC, to Hon. Patrick J. Leahy, Chairman, Sen. Comm. on the Judiciary, at 8–9 (July 29, 2013), *available at* <http://www.uscourts.gov/uscourts/courts/fisc/honorable-patrick-leahy.pdf>.

¹⁰² At the time of Judge Walton’s letter, the only public record of a wholly adversarial proceeding before the FISA Court came under the now-defunct Protect America Act of

recipient-based adversarial process *could* provide a sufficient check on secret government surveillance programs, at least thus far, it clearly has not done so.

B. *The “Special Advocate” Proposals*

This shortcoming may help to explain the growing support for proposals to have some kind of “special advocate” participate in at least some cases before the FISA Court.¹⁰³ Although the details vary, the basic gist is that Congress would create an independent office staffed by (or a rotating panel of court-designated private) lawyers empowered to appear in at least some cases before the FISA Court, specifically tasked with arguing *against* the government’s interpretation of the relevant statutory and constitutional authorities. Such lawyers would have appropriate security clearances—allowing the FISA Court to entertain such arguments in secret—and, under most of the proposals, would not formally represent a “client.”¹⁰⁴ Instead, their statutory obligation would be to play the devil’s advocate—to assist the FISA Court by providing alternative possible readings of the same procedural, evidentiary, statutory, and constitutional language on which the government has rested its application.¹⁰⁵

At least with regard to proceedings before the FISA Court, the creation of a “special advocate,” however conceived, should not raise any new Article III concerns (if anything, it should *mitigate* existing constitutional objections with respect to the absence of adverseness

2007, Pub. L. No. 110-55, § 2, 121 Stat. 552, 554–55 (formerly codified at 50 U.S.C. § 1805b (2008)), and culminated in the FISA Court of Review’s 2008 decision in *In re Directives [Redacted] Pursuant to Section 105B of the Foreign Intelligence Surveillance Act*, 551 F.3d 1004 (FISA Ct. Rev. 2008). As we now know, Yahoo! was the adversarial party in that case.

¹⁰³ See, e.g., Carr, *supra* note 89.

¹⁰⁴ It should follow that, if the “special advocate” *was* tasked with representing U.S. persons who are subject to FISA Court-approved surveillance, then the only Article III issue would be the post-*Clapper* standing question addressed in Part II, and the adverseness and appellate standing issues discussed herein would be moot.

¹⁰⁵ For two of the more comprehensive proposals in this regard, compare the FISA Accountability and Privacy Protection Act of 2013, S. 1215, 113th Cong. (2013), and the FISA Court Reform Act of 2013, S. 1467, 113th Cong. (2013). See generally Mark M. Jaycox, *EFF’s Cheat Sheet to Congress’ Spying Bills*, EFF.ORG (Sept. 11, 2013), <https://www.eff.org/deeplinks/2013/08/effs-cheat-sheet>.

before that court).¹⁰⁶ Assuming *arguendo* that these disputes *already* comport with Article III's justiciability requirements, it is difficult to see how adding a new party in suits initiated by the government as plaintiff would raise any new concerns. Although reasonable people will certainly disagree about the wisdom of competing "special advocate" proposals as a matter of policy, it is difficult to dispute their validity as a matter of law—at least in proceedings before the FISA Court.¹⁰⁷

C. *Standing to Appeal*

Where things get tricky—and where Article III standing doctrine would again rear its jurisprudential head—is if and when the special advocate *loses* before the FISA Court, and seeks to appeal an adverse decision to the FISA Court of Review. After all, parties must have Article III standing not just at the beginning of a suit (which exists in the FISA context thanks to the government's role), but also in order to *appeal* adverse decisions.¹⁰⁸ In the context of appellate standing, the Supreme Court has held that such standing *can* arise merely from an adverse (or even satisfactory¹⁰⁹) decision below—but only so long as that decision caused a specific and concrete injury to the party seeking to appeal.¹¹⁰

Consider, for example, the Court's June 2013 decision in *Hollingsworth v. Perry*—the case challenging California's ban on gay marriage, "Proposition 8."¹¹¹ In *Perry*, there was no question that the plaintiffs had standing in the district court to challenge Prop. 8 on federal constitutional grounds. But once the district court ruled in their favor, the state declined to appeal. Instead, a group of proponents and local government officials who had intervened in the district court sought to challenge the district court's decision on

¹⁰⁶ See Marty Lederman & Steve Vladeck, *The Constitutionality of a FISA "Special Advocate,"* JUST SECURITY (Nov. 4, 2013 1:34 p.m.), <http://justsecurity.org/2013/11/04/fisa-special-advocate-constitution/>.

¹⁰⁷ See generally Stephen I. Vladeck, *The Case for a FISA "Special Advocate,"* 42 PEPP. L. REV. (forthcoming 2015) (summarizing and assessing the competing proposals, and defending one specific variation as the best way forward).

¹⁰⁸ See, e.g., *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997).

¹⁰⁹ See, e.g., *Camreta v. Greene*, 131 S. Ct. 2020, 2028–33 (2011).

¹¹⁰ *Diamond v. Charles*, 476 U.S. 54, 62 (1986).

¹¹¹ 133 S. Ct. 2652 (2013).

appeal.¹¹² Writing for a 5-4 majority (that did not include Justice Kennedy), Chief Justice Roberts held that the proponents lacked appellate standing:

To have standing, a litigant must seek relief for an injury that affects him in a “personal and individual way.” He must possess a “direct stake in the outcome” of the case. Here, however, petitioners had no “direct stake” in the outcome of their appeal. Their only interest in having the District Court order reversed was to vindicate the constitutional validity of a generally applicable California law.¹¹³

Rejecting the cases marshaled by Justice Kennedy’s dissent, Chief Justice Roberts concluded by stressing that “none comes close to establishing that mere authorization to represent a third party’s interests is sufficient to confer Article III standing on private parties with no injury of their own.”¹¹⁴ And although the intervenors might have been able to claim standing if they were acting as “agents” of the state, it was clear from the record that no such agency relationship existed.¹¹⁵

Dissenting, Justice Kennedy suggested that the Chief Justice’s opinion was marked with “much irony.”¹¹⁶ After all, “A prime purpose of justiciability is to ensure vigorous advocacy, yet the Court insists upon litigation conducted by state officials whose preference is to lose the case.”¹¹⁷ Indeed, as Justice Kennedy explained, “The doctrine is meant to ensure that courts are responsible and constrained in their power, but the Court’s opinion today means that a single district court can make a decision with far-reaching effects that cannot be reviewed.”¹¹⁸

¹¹² After certifying a question of state law to the California Supreme Court, *see Perry v. Schwarzenegger*, 628 F.3d 1191 (9th Cir. 2011); *Perry v. Brown*, 265 P.3d 1002 (Cal. 2011), the Ninth Circuit held that the intervenors *did* have standing. *See Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated*, 133 S. Ct. 2652.

¹¹³ 133 S. Ct. at 2662 (citations omitted).

¹¹⁴ *Id.* at 2665.

¹¹⁵ *See id.* at 2666–67.

¹¹⁶ *Id.* at 2674 (Kennedy, J., dissenting).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

One could make similar arguments about appellate standing in the context of a FISA “special advocate.” Given the unique and effectively non-adversarial nature of proceedings before the FISA Court, allowing a special advocate would help to “ensure vigorous advocacy”; authorizing an appeal from an adverse decision would protect against a scenario wherein “a single district court can make a decision with far-reaching effects that cannot be reviewed.” Once again, then, if the question is simply whether Justice Kennedy would endorse standing on such terms, the case law provides a fairly clear answer. And yet, if *Perry* is taken at face value, then there may be five votes for the contrary proposition—and for no appellate standing for a party like the “special advocate” at the heart of many of the current FISA reform proposals, unless it incurs a specific and concrete injury as a direct result of an adverse decision by the FISA Court.¹¹⁹

D. *The Unanswered Question: Congress and Appellate Standing*

To be sure, *Perry* raised the question of whether *states* could create an interest sufficient to confer appellate standing upon a party not directly injured by the decision below. Another question, and one not considered in *Perry*, is whether *Congress* could do so. As Justice Kennedy pointed out in his *Perry* dissent, the Supreme Court has previously recognized Article III standing for private parties to prosecute criminal contempt and *qui tam* actions (in both of which they are ostensibly proceeding on behalf of the federal government); for “next friends” suing on behalf of the real party in interest; and for shareholders in shareholder-derivative suits.¹²⁰

And at least in the contempt, *qui tam*, and shareholder-derivative contexts, those suits are pursuant to express statutory authorization—authorization that arguably does *not* create the agency relationship

¹¹⁹ Congress could also sidestep the constraints on appellate standing by providing for appeals *qua* judicial certification, as is currently the case under 28 U.S.C. § 1292(b) (1992) for interlocutory appeals, and § 1254(2) for questions certified to the U.S. Supreme Court. Although there is no authority addressing the extent to which Article III standing principles apply to judicially certified questions, there is also no suggestion that an appellate court would lack the power to answer certified questions from a lower court—especially where, as here, *that* court was possessed of a live and adversarial dispute. Congress might also borrow a page from the context of bankruptcy courts, where those courts are allowed to act finally with regard to “core” bankruptcy matters, but may only make recommendations (that must be confirmed by the district court) in “non-core” matters. See 28 U.S.C. § 157 (2005). Although the specifics of these alternative approaches are beyond the scope of this essay, the larger point they underscore is the array of options potentially available to Congress beyond a direct statutory appeal *by* the special advocate.

¹²⁰ *Perry*, 133 S. Ct. at 2673–74 (Kennedy, J., dissenting).

upon the absence of which the *Perry* majority appeared to base its reasoning.¹²¹ Thus, perhaps one way to reconcile these seemingly divergent decisions is by concluding that Congress has—and would have—greater latitude to confer appellate standing upon those not directly injured by a lower-court decision than states do after *Perry*, analogizing to the greater latitude Justice Kennedy would give (and has given) to Congress after and in light of *Lujan*. Such an argument might have especial force if Congress simultaneously vested such an official with the responsibility to exercise some modicum of independent federal authority.

In one sense, perhaps the most important takeaway from the above analysis is the extent to which the Supreme Court's Article III standing jurisprudence interposes substantial obstacles to judicial review of secret surveillance programs (if not all secret government conduct) on the merits. Yes, Justice Kennedy's *Lujan* concurrence appears to leave *more* room for Congress to authorize challenges to secret surveillance programs based on evidence that interception of the plaintiffs' communications is reasonably likely, if not "certainly impending." And yes, no Article III obstacle should prevent Congress from expanding the scope and volume of adversarial participation in matters before the FISA Court, even if Article III may present difficulties in allowing such statutory adversaries to appeal adverse decisions to the FISA Court of Review and, if necessary, the Supreme Court.¹²² Thus, those who seek reforms of the FISA process with an eye toward increased accountability and oversight could certainly look to these remedies as useful steps in that direction.

But if nothing else is clear, it should hopefully be obvious that a truly comprehensive scheme for adversarial judicial review of secret surveillance programs may in fact be unobtainable, at least without sacrificing the very secrecy that arguably enables the *success* of such governmental foreign intelligence activities.¹²³ That is to say, absent

¹²¹ *Id.* at 2666–67 (majority opinion).

¹²² Although Judge Bates, among others, has raised *policy* concerns about expanded adversarial participation before the FISA Court, most of those objections are focused on such participation in "classic" FISA cases—i.e., individualized probable cause determinations. *See, e.g.,* Steve Vladeck, *Judge Bates and a FISA "Special Advocate,"* LAWFARE (Feb. 4, 2014, 9:24 a.m.), <http://www.lawfareblog.com/2014/02/judge-bates-and-a-fisa-special-advocate/>. Most now appear to agree that at least *some* additional adverse presentation in bulk surveillance cases, including those arising under sections 215 and 702, is normatively desirable. *See* Vladeck, *supra* note 107.

¹²³ This point distinguishes the Guantánamo detainee cases, for example, or proceedings before the as-yet-unused Alien Terrorist Removal Court, *see* 8 U.S.C. § 1534(e)(3)(F)

some meaningful shift in the Supreme Court's understanding of the constraints Article III's case-or-controversy requirement imposes upon the adjudicatory power of the federal courts, or far greater (if not mandatory) participation in the FISA process by those entities that *receive* production orders and intelligence directives under the statute, it may not in fact be constitutionally possible to provide in all or even most cases for meaningful adversarial review. This does not mean, of course, that Congress should not try to so provide to the maximum extent feasible; if anything, it only underscores the extent to which such review cannot—and, therefore, *should* not—be the sum total of efforts to “reform” the foreign intelligence surveillance activities of the U.S. government, at least for those who truly believe that such reform is warranted.

(2001), in both of which security cleared counsel *are* authorized to represent the subjects of the government's counterterrorism authorities. In those settings, the subjects are *aware* of the government's general policies; they are merely not privy to that evidence relevant to their case which is properly classified. See David Cole & Stephen I. Vladeck, *Comparative Advantages: Secret Evidence and “Cleared Counsel” in the United States, the United Kingdom, and Canada*, in *SECRECY, NATIONAL SECURITY, AND THE VINDICATION OF CONSTITUTIONAL LAW* 173 (David Cole et al., eds., 2013). In the surveillance context, in contrast, it would defeat the programs' purpose if the subjects of the government's secret foreign intelligence surveillance activities were aware of those activities in the first place.

